UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, Plaintiff,	:	Civil Action No.: 1:08-cv-827
versus	:	Friday, September 16, 2022
CACI PREMIER TECHNOLOGY, INC., Defendant.	:	

The above-entitled motion to dismiss was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:46 a.m.

A P P E A R A N C E S:

FOR THE PLAINTIFF:
BAHER AZMY, ESQUIRE
KATHERINE GALLAGHER, ESQUIRE
THE CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
7th Floor
New York, New York 10012
(212) 614-6464

FOR THE DEFENDANT:
JOHN O'CONNOR, JR., ESQUIRE
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
7th Floor
Washington, D.C. 20036
(202) 429-3000

WILLIAM DOLAN, III, ESQUIRE
WILLIAM D. DOLAN, III, P.C.
8270 Greensboro Drive
Suite 700
Tysons Corner, Virginia 22102
(703) 584-8377

COURT REPORTER:
STEPHANIE M. AUSTIN, RPR, CRR
Official Court Reporter
United States District Court
401 Courthouse Square
Alexandria, Virginia 22314
(571) 298-1649
S.AustinReporting@gmail.com

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 8-827, Suhail Najim Abdullah Al Shimari, et al. versus CACI Premier Technology, Inc.

Would counsel please note their appearances for the record.

MR. O'CONNOR: Good morning, Your Honor. John O'Connor and William Dolan for CACI.

THE COURT: Good morning. Nice to see you all in court again.

MR. DOLAN: Good morning, Your Honor.

MR. AZMY: Good morning, Your Honor. Baher Azmy and Katherine Gallagher for the plaintiffs.

THE COURT: Good morning. All right. Well, we have the defendant's latest motion, I think it might be the sixth, to dismiss for lack of subject matter jurisdiction citing to three additional Supreme Court cases for the Court to consider.

I have not yet given you a ruling on the other pending motion to dismiss, and I'm planning probably to combine the two. We have an opinion in draft. I haven't finished it yet. I thought I would hear your discussion today and then incorporate it into the final decision that should be coming out probably sometime in October. All right.

But, Mr. O'Connor, I'll let you start.

MR. O'CONNOR: Thank you, Your Honor.

Your Honor, *Egbert* makes clear that judicial implied causes of action are highly, highly disfavored. And I think the rules adopted in *Egbert* are clear in their application.

One, creating a cause of action is a legislative endeavor that involves evaluating a broad range of policy considerations.

And, two, Congress is far more competent than the Judiciary to weigh those policy consideration.

Three, the Court expressed doubt about the Judiciary's power to do so at all. The Court said: The Judiciary's authority to do so at all is, at best, uncertain.

And then, four, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, the courts must refrain from creating one.

And then last, even a single sound reason to defer to Congress is enough to require a court to refrain from creating such a remedy.

I think of this as what, in my house, we call the Christmas card test, which is if my wife says, should I send a Christmas card to so-and-so, I say, the fact that you asked answers the question. Of course you should because

you don't want to antagonize somebody who maybe you should have sent a Christmas card. Well, that's the rule the Supreme Court has adopted here. If there's any reason to doubt whether the courts, as opposed to Congress and the president, should be delineating the contours of a private cause of action, then the courts should not do it.

THE COURT: Well, what specifically do you think *Egbert* does to change the second step of *Sosa*?

MR. O'CONNOR: Well, what *Egbert* does is -- *Sosa* talked about that a -- the two pieces of the analysis, is the cause of action clear, universal, et cetera, and, two, you know, vigilant door-keeping. *Sosa* was basically opaque on what that second requirement required.

And Your Honor, when you denied our motion to dismiss, seemed to indicate that what that meant was that the Court had to make very sure that the proposed tort is universal, obligatory, you know, among civilized nations. And, to be candid, that did not strike me as obviously wrong given what *Sosa* had said. It didn't provide any guidance at all.

And what we've learned since the Court's prior motion to dismiss ruling from cases like *Jesner*, from cases like -- well, certainly *Egbert*, is that it's a distinct separation of powers inquiry, one that asks is there any reason. Because courts generally should not be in the

business of implying causes of action. And it paired what certainly happens in *Sosa* is the second part of the test for an ATS claim has merged into the second part of the test for a *Bivens* claim. As we laid out in the chart in our reply brief, the test is exactly the same, that if there's any reason, then the Court doesn't do it.

And if we turn to *Egbert*, *Egbert* relied on -- one of the main reasons it held that there should be no cause of action was national security. And what were the national security implications in that case? Well, a border patrol agent was questioning someone about potential illegal border crossings, American citizen completely in the United States, and allegedly roughed him up in the process of doing that. And the Court said, oh, we can't have that. There's a reason to pause because there's national security implications.

Well, if that's enough, what are the national security implications here? We have soldiers guarding and interrogators interrogating detainees detained by the United States military in a war zone where they are trying to collect intelligence with respect to an insurgency which is killing American soldiers every day.

And if you compare the national security implications of *Egbert* versus the national security implications of this case, which not only has those facts

but involves three separate invocations of the state secrets privilege, involves a case of proceeding with no ability to have any discovery into who actually interrogated these plaintiffs, who interacted with these plaintiffs. There's not really any comparison of the national security implications here.

But then *Egbert* has another reason why the Court said a cause of action should not be implied, and that was while there's an alternative remedy established. And what was the alternative remedy in *Egbert*? You could file a grievance. That's it. That was the alternative remedy. But it existed. And the Court said, it's not really for the courts to decide whether that alternative remedy is good enough. It exists. That's it.

Well, what do we have here? We've had Congress legislate all over questions of things like torture, cruel, inhumane and degrading treatment. And those statutes apply criminally; do not create a private right of action, but they do apply criminally.

We also have a claim -- you know, an administrative claim process that is available -- well, it was available, where persons alleging that they were injured while in the United States custody in Iraq and filed an administrative claim where the United States, which has access to all the information that neither Your Honor nor we

have access to about the circumstances of these plaintiffs, could decide whether there's actual facts supporting claims of mistreatment, and, if so, determine what ought to be done in terms of allowing a claim or not.

And so the -- both of the reasons in *Egbert* that were found independently sufficient to not permit implying a cause of action were present in this case, and they're present in more.

The national security implications are greater. The legislation and the availability of remedies is greater then they were in *Egbert*. But, again, the Court's not -- you know, per *Egbert*, the adequacy of those remedies is not a matter that the courts ought to consider; the existence is enough.

THE COURT: All right. Thank you. Let me hear the response to that.

MR. O'CONNOR: Thank you.

MR. AZMY: Good morning, Your Honor.

Three basic responses. First, *Egbert* merely applies the separation of powers analysis from *Ziglar v. Abbasi* decided in 2017, and Your Honor's two decisions in 2018 rejecting that separation of powers framework. And also, *Abbasi* was a national security case, it was a post-9/11 case. Your decisions in February and June of 2018 rejected those separation of powers arguments. The June

2018 arguments rejected those -- decision rejected those separation of powers arguments as law of the case. So I suppose now we have double, or law of the case squared.

Second, the ATS -- as Your Honor also found, the ATS is fundamentally different than a *Bivens* cause of action because the ATS does not imply a cause of action; it imposes an express cause of action.

Let's just sort of think for a minute about the two different kinds of paradigms. In *Bivens* and in implying causes of action from a statute, Congress has -- or the Constitution has set forth a norm that Federal officials or other people have to follow, but Congress has chosen not to give individuals the right to come to Federal court and enforce the norm against the Government, let alone for damages.

The ATS is exactly the opposite. Congress has authorized a specific person, an alien, to assert a cause of action for tort. And what is tort? That's 18th century speak for damages. And what's interesting is the ATS is different from implied causes of action, because while presupposing a damage remedy, it leaves the norm open. And, per *Sosa*, Your Honor has found that the norm of torture of war crimes in CIDT is sufficient to confer jurisdiction, which I think really ultimately gets us to the heart of CACI's argument, which is an attempt to disregard or

overrule *Sosa*. That's Step 1.

Your Honor has found jurisdiction, and Footnote 4 of your June 2018 opinion says: Once jurisdiction has been established, there may be prudential considerations that suggest the case should not go forward. But every prudential consideration that CACI has put forward Your Honor has considered, or the Fourth Circuit has considered and rejected. Political question doctrine, FTCA preemption law, war immunity. We've done this all before.

THE COURT: Of course the Fourth Circuit did not actually rule or has not actually reviewed the substance of the 2018 decision. Because that was a pass. They said it was not appealable. And, as we all know, for some strange reason, that opinion sat for over two years at the Supreme Court, which ultimately decided not to grant cert.

MR. AZMY: Right.

THE COURT: I thought they would, frankly, but they didn't. So it's a strange -- that decision is actually untested at this point.

And since then, as you also know, because that's what's pending before the Court, there have been several other Supreme Court decisions addressing the -- and we're not discussing that specifically today, but the extraterritoriality reach. I mean, that has certainly changed, to some degree.

So I think that the legal landscape in which this case is now pending has shifted. I don't know if you want to address that, but I would be interested, since you're all here, to hear your opinion about that.

MR. AZMY: Well, with respect to *Egbert* and *Abbasi*, not only are your decisions the law of this case pending some change in the Fourth Circuit with respect to how to analyze the ATS, *Sosa* is still good law. And there is this fundamental analytical difference between the ATS, a congressional authorization for damages and implying a cause of action. It's fundamental.

And with respect to extraterritoriality, Your Honor, we continue -- there has not been a fundamental change in the law regarding extraterritoriality. As the Fourth Circuit has found, *Kiobel* has not been reversed. I found it surprising they cited the *Elbaz* case, which affirmatively relies on and applies the *Kiobel* "touch and concern" test, and thereafter applies the *Nabisco* "focus" test.

Because as I think we've explained to the Court before, all of these tests are in conversation with each other, they are two ways of describing Step 2, the extraterritoriality analysis, because they're a domestic application. And one way is to ask is this a "touch and concern"; another way is to ask directly does this satisfy

the "focus" of the statute. And as Your Honor has already found, the "focus" of the statute, the "object of its solicitude," is to ensure that there's no international tension from the U.S.'s failure to provide a remedy for harms done to foreign nationals.

And also with respect to *Nestlé*, as we put forward in our briefing, our facts are fundamentally different than those in *Nestlé*. In *Nestlé*, there was just an allegation that there was general corporate activity and visits to Côte d'Ivoire to buy cocoa. The Court said, first, there is no presence -- corporate presence in Côte d'Ivoire; and, second, there's absolutely no nexus between the general corporate activity and the torts alleged in -- the child slavery alleged, sort of just driving down prices that might incentivize child slavery.

Here, as Your Honor well knows, there was a direct corporate presence in Abu Ghraib. And, here, as Your Honor has found -- and this is also law of the case -- there was direct participation between U.S. headquarters here and the alleged torture there, suggesting a very serious nexus that was absent in *Nestlé*. So there have been developments, but we think our case still survives.

THE COURT: All right. Mr. O'Connor.

MR. O'CONNOR: Yes, Your Honor, briefly.

We don't think that a cursory review of these

cases supports a proposition that the context between *Bivens* is different from the context of ATS.

Sosa is clear that ATS is jurisdictional only, creates no exceptional causes of action; only provides jurisdiction. Well, what's Section 1331 do? Creates jurisdiction only for claims brought under the Constitution.

The next question for both *Bivens* and ATS is, should a court imply a cause of action. And, as we've explained, the first part of the test for each is different, but the second -- the separation of powers inquiry is exactly the same. The words are identical, word for word. The tests are applicable to both. So we don't see that you can just wave away the *Bivens* case as irrelevant.

And, as we've pointed out, there's a string of five cases in a row from the Supreme Court where they're citing back and forth to each other, ATS to *Bivens* cases, *Bivens* cases to ATS.

Mr. Azmy talked a bit about extraterritoriality and about, well, we think that "touch and concern" and "focus," those are -- you know, there's two ways you can look at it. This is what the Court said in *Elbaz*: To identify a permissible domestic application, we must -- not may, must -- determine the statute's focus and whether the conduct relevant to the statute's focus occurred inside the United States. It is not enough for conduct to merely

"touch and concern" the territory of the United States; the conduct must be domestic. That could have been pulled from any number of briefs that we've written in the last five years here and in the Fourth Circuit. The Fourth Circuit's view of the law as stated in *Elbaz* is identical to what we've been saying for at least five years.

And then, finally, Mr. Azmy talked about, well, the facts here are different than *Nestlé* because there was no corporate presence by *Nestlé* in Côte d'Ivoire. That's -- well, the Court accepted the allegations that folks from *Nestlé* were visiting and were aware of child slavery going on and continued to fund the farmers who were engaged in the child slavery, and so that's not enough.

But more to the point, whether there's a presence outside the United States is very much irrelevant to all of this, because, as we know, what did the Court hold in *Kiobel*? ATS has no extraterritorial application. They use the word "none" to describe it. So things like, well, you're a U.S. corporation, you're -- you know, you have people -- you know, U.S. citizens engaged, you know, in contracts with the United States to do work overseas. None of that matters. All that matters is what's the focus of the statute, and *Elbaz* answers that. *Elbaz* says: For secondary liability claims -- and that's all we've got left here -- the focus of the statute is the underlying wrongful

conduct. The object of the conspiracy, which, you know, that case didn't have anything about abetting, but by analogy, it's the purpose of the aiding and abetting, which is the conduct in Iraq. Thank you.

THE COURT: All right. Thank you.

Did you have anything you wanted to add from the plaintiff's standpoint? I was watching body language, and it looked as though you had something you wanted to say.

MR. AZMY: Oh, just with respect to the 1331 argument, I think that's somewhat confused. I mean, that's what someone would invoke to -- say invoke FERPA, the statute issue in *Gonzaga*. And then the secondary question is, is there a private cause of action there, to which the Court would say no. But the ATS, as we've said, explicitly authorizes an individual to go to Federal court and to sue for tort. Thank you.

THE COURT: Thank you. All right. Thank you, counsel. Again, as always, very interesting arguments.

We'll recess court for the day.

MR. AZMY: Thank you, Your Honor.

MR. O'CONNOR: Thank you, Your Honor.

(Proceedings adjourned at 11:05 a.m.)

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR